U.S. Department of Justice

Office of Intelligence Policy and Review

Washington, D.C. 20530

March 1, 1982

MEMORANDUM FOR WILLIAM B. WARK
Executive Secretary, Interdepartmental Committee
on Internal Security (ICIS)

Re: The Immigration and Nationality Act
of 1952 - Technology Transfer

You have asked for our opinion regarding whether the Immigration and Nationality Act of 1952 authorizes the denial of visas where there is reason to believe that the issuance of a visa may result in exposure to the foreign visitor of technology that is otherwise protected from transfer to foreign persons by U.S. law. We conclude that, under certain circumstances, visas may be denied pursuant to 8 U.S.C. § 1182(a)(27) in order to prevent illegal technology transfers but that this determination requires careful consideration of the facts and circumstances of each case based on established guidelines. An interagency group should be convened to recommend such guidelines and the process by which they will be applied.

Section 212(a)(27) of the Act [8 U.S.C. § 1182(a)(27)] reads as follows:

> Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States:
>
> * * * *
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;
>
> * * * *

Your question raises two issues concerning this provision: (1) whether adverse technology transfer consequences may prop-

erly be taken into account in determining whether an alien's activities would be "prejudicial to the public interest, or endanger the welfare, safety, or security of the United States"; and (2) if so, what facts are necessary to trigger this paragraph, thereby rendering an alien inadmissible to the United States.

I.

With respect to the first issue, the legislative history relating directly to the passage of the Immigration and Nationality Act of 1952 can be read as limiting application of section 212(a)(27) to cases where the foreign visitor poses a threat to the internal security of the U.S. However, it is also necessary to consult the legislative history of the Subversive Activities Control Act of 1950 (SACA), 64 Stat. 987, since the language of section 212(a)(27) was taken almost verbatim from section 22 of that Act. In summary, Congress' choice of language in the SACA is instructive, particularly its use of the phrase "prejudicial to the public interest," because that phrase had a well-settled administrative interpretation in 1950.

Prior to enactment of the SACA, Congress had authorized the President to impose additional restrictions on the entry of persons into the United States during times of war or national emergency. 1/ In Proclamation 2523, 3 CFR 270 (1943 Cum. Supp.), the President declared that an alien would not be permitted to enter if his entry would be "prejudicial to the interests of the United States," as provided in regulations to be promulgated by the Secretary of State in consultation with the Attorney General. Proclamation 2523 and the regulations issued by the Secretary of State, 2/ which were still in effect at the time, were discussed in the Senate Report that first proposed the SACA as part of the body of immigration law upon which Congress was building. S. Rep. No. 2230, 81st Cong., 2d Sess. 22 (1950). Thus, the prohibition in section 212(a)(27) against the entry of aliens when there is reason to believe they intend to engage in activities "prejudicial to the public interest" appears to be a direct descendant of Presidential

---

1/ Act of May 22, 1918, 40 Stat. 559, as amended by the Act of June 21, 1941, 55 Stat. 252, hereinafter referred to as the Passport Control Act of 1918.

2/ 8 CFR 175.53 (1949).

Proclamation 2523 and its implementing regulations. 3/ Those regulations listed eleven categories of aliens who were inadmissible on the ground that their entry would be "prejudicial to the public interest" or "prejudicial to the interests of the United States," one of which is relevant to the question of the extent to which technology transfer may be the basis for denying entry. The regulations provided:

> § 175.53 Classes of aliens whose entry is deemed to be prejudicial to the public interest. The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States . . .
>
> * * *
>
> (d) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of the measures adopted by the Government of the United States for the defense of the United States . . . . (Emphasis supplied.)

This particular category is instructive because it indicates that section 212(a)(27) cannot be read as limited to classic internal security cases, i.e., those which involve persons who believe in or advocate objectionable doctrines, but may be extended to include any alien who attempts to circumvent measures adopted by the United States for the defense of the country even in the absence of war or national emergency. 4/

Such measures were adopted by the Congress in the Export Administration Act of 1979. 5/ Congress specifically recognized

---

3/ April 11, 1977 memorandum to Commissioner Leonard F. Chapman, Immigration and Naturalization Service, from Acting Assistant Attorney General John M. Harmon, Office of Legal Counsel.

4/ The language of the Passport Control Act of 1918, from which the authority for the State Department regulations flowed, is quite similar to that included in the SACA, from which section 212(a)(27)'s language was taken. The major difference is that the Passport Control Act provision, unlike that in the SACA, is limited to time of war or national emergency.

5/ 50 U.S.C. App. § 2401 et seq.

the need to control exports of technology that could make a significant contribution to the military potential of any country that would be detrimental to the national security of the United States. 6/ Declaring that it was the policy of the United States to restrict the export of goods and technology in order to avoid detrimental effects on the national security, 7/ the Congress authorized a regulatory and licensing framework to control the export of critical technology and legislated both civil and criminal penalties for violation of the Act or any regulation, order, or license issued thereunder. 8/ It seems clear that activities prohibited by statute in the interests of the national security, which includes the national defense, would fall within the purview of the phrase "activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States," as it was understood in 1952 when the Immigration and Nationality Act was enacted.

We believe, moreover, that our conclusion as to the applicability of section 212(a)(27) to prevent technology transfer would be valid even in the absence of a well-settled administrative meaning for that phrase in 1952. Certainly actions that are prohibited by a licensing scheme designed to protect the national security and punishable under a criminal provision to enforce the regulatory framework must be regarded as activities that Congress would agree should be considered to be prejudicial to the public interest and to endanger the security of the United States.

> Even in briefest outline [the legislative controls on aliens who seek to enter the United States] are manifestly complex, redundant, and frequently obscure. But the very prolixity of these legislative expressions is evidence of the urgent desire of Congress to shut the gates of America against aliens who may seek to undermine the national strength and safety.

C. Gordon, The Immigration Process and National Security, 24 Temp. L. Q. 302, 307 (1951).

6/ Id. § 2401(5) and (8). The term "national security" is used to include considerations of national defense. See, e.g., E.O. 12065, § 6-104.

7/ 50 U.S.C. App. § 2402(2)(A).

8/ Id. § 2410.

II.

Having determined that adverse technology transfer consequences may be taken into account in determining whether an alien is excludable under section 212(a)(27) of the Act, we turn to the question of what facts are necessary to trigger this paragraph, thereby rendering an alien inadmissible to the United States. This question is difficult to consider in the absence of specific cases. It is a mixed question of law and fact requiring the expertise of intelligence and export control enforcement personnel, and should be the subject of further discussions between the State and Justice Departments and other interested entities. As a general matter, however, we note that the only inquiry to be made under paragraph (27) is whether there is "reason to believe" that an alien seeks "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest . . . or endanger the . . . security of the United States."

Obviously, the mere fact that a businessman or scientist might be exposed to controlled technology while in the United States, standing alone, is not enough to trigger section 212(a)(27). The law as framed seems to permit findings of ineligibility under this section only as to persons whom we have reason to believe intend to engage in proscribed activities. Nevertheless, there is no "probability" requirement in paragraph (27). It requires exclusion if the Attorney General or consular officer "has reason to believe" that an alien seeks entry into the United states even "incidentally" to engage in activities prejudicial to the security of the United States. Clearly, this standard encompasses those visitors who have a substantial connection to a foreign hostile intelligence service, i.e., known intelligence officers or reliably identified co-optees of a hostile intelligence service. 9/ In our opinion, however, paragraph (27) may come into play even where there is no substantial connection to an intelligence service if prudent experts can point to articulable facts which, taken together with rational inferences from those facts, reasonably warrant the belief that an alien seeks to enter this country to acquire controlled technology. We believe, for example, that where an alien seeks admission to attend a conference, including those aspects of the conference that will include controlled technology, sufficient grounds may well exist for his exclusion.

9/ Memorandum from Associate Attorney General Michael J. Egan to Deputy Secretary of State Warren M. Christopher and FBI Director William H. Webster, dated January 30, 1979.

Likewise, actions of an alien on previous visits, or a known pattern and practice of certain groups of aliens, can often be valid indicators of future intentions and may be considered in determining whether such person is admissible. 10/

The determination of admissibility, however, must be made on a case-by-case basis. As noted above, all of the problems associated with that determination cannot be resolved in the abstract, and general guidelines should be the subject of inter-agency discussion prior to any case-by-case review. Nevertheless, our conclusion that paragraph (27) contains a relatively low "standard of proof" is supported by the legislative history of the Immigration and Nationality Act of 1952. A 1950 Senate report found that

> "wider discretion should be granted to those charged with administering the laws relating to the entry of aliens into this country to deny admission to those aliens who are known or there is reason to believe will, or would be likely to engage in any activity subversive to the National Security...." (Emphasis supplied.)

S. Rep. No. 1515, 81st Cong., 2d Sess. 800 (1950). 11/

III.

Two additional observations concerning section 212(a)(27) are appropriate. First, unlike paragraph (28), the Attorney

---

10/ There are obvious differences between these situations and the classic situation involving a known or suspected operative of a hostile foreign intelligence service that is the subject of the DoJ memorandum cited in footnote 9 and of the interagency committee (the Egan Committee) that was established to consider such cases. Where a particular case does not meet the criteria of the "spy" cases, i.e., a substantial connection with a foreign hostile intelligence service, the objection is really to access to controlled technology rather than travel generally in the United States. Because of that difference, the possibility as well as the effectiveness of placing restrictions on the visa, rather than total exclusion, should be explored. The purpose, length and itinerary of a proposed visit under these circumstances can be valid indicators of the probability or possibility that the applicant seeks to enter this country to engage in "prejudicial activities."

11/ S. Rep. No. 1515 contained the basic findings to support the Immigration and Nationality Act of 1952. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 27 (1952). It is, therefore, especially instructive in interpreting that Act even though it was prepared in a prior Congress.

General does not have discretion to waive the exclusion requirement under paragraph (27). Once an alien is found to fall within the purview of paragraph (27), he may not be admitted, and other aliens in identical circumstances must also be excluded, even where their presence might be beneficial for other reasons. This consideration should also be the subject of some deliberation when interagency meetings take place to determine what facts will trigger paragraph (27) in technology transfer cases.

Second, because paragraph (27) cannot be waived by the Attorney General, exclusion under this paragraph is not reviewable by the courts. The unadmitted and nonresident alien has no constitutional right of entry into the United States as a nonimmigrant or otherwise. 12/ "The [Supreme] Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" 13/ The courts generally recognize that power to protect the country against foreign dangers is to be exercised exclusively by the political branches of government. 14/ Likewise, it is our view that, absent discretion to waive the exclusion requirement, a determination of inadmissibility would be unreviewable even where the plaintiffs are U.S. citizens asserting their own First Amendment rights to have an alien enter and to hear him explain and seek to defend his views. Cf. Kliendienst v. Mandel, 408 U.S. 753 (1972).

IV.

In conclusion, we believe that visas may be denied pursuant to 8 U.S.C. § 1182(a)(27) in order to prevent illegal technology transfers. While the criteria used to determine ineligibility for entry must be directly related to the determinations required to be made by the terms of paragraph (27), that paragraph falls far short of requiring probable cause to believe an alien will engage in proscribed activities upon entry to the United

---

12/ United States ex rel. Turner v. Williams, 194 U.S. 279, 292 (1904), cited with approval in Kliendienst v. Mandel, 408 U.S. 753 at 762 (1972).

13/ Kliendienst v. Mandel, supra note 12, at 766 (citations omitted).

14/ The Chinese Exclusion Case, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893). Since 1893 the Court has on numerous occasions reaffirmed this principle. Some examples of these general reaffirmations are set forth in the Mandel case, supra note 12, at 766 n. 6.

States. We recommend, however, that guidelines similar to those that govern the deliberations of the Egan Committee be established with regard to the application of paragraph (27) to visa applicants for reasons of technology transfer.

Mary C. Lawton

MARY C. LAWTON
Counsel for Intelligence Policy
Office of Intelligence Policy and Review